NEW ZEALAND WALKING ACCESS COMMISSION
BOARD REPORT

18 September 2019

Roadways on Māori land

Purpose

1. At its 3 July 2019 meeting the Board requested a paper describing Roadways on Māori land (sometimes referred to as *Māori Roads*).

Background

2. A 12 August 2013 Board Paper 'Roadways on Māori Land' is attached at Appendix 1. This paper noted that at that time, "the Commission has not received public enquiries about the use of Māori roadways." Since then the Commission has received four enquiries from the public about use of Roadways on Maori land.

3. A key aspect is that Māori land has special legislated provisions for access to it and has different characteristics from general land and public land and. *Te Ture Whenua Māori Act 1993* (or *Māori Land Act 1993*) provides for the laying out of roadways on Māori land by the Māori Land Court. They are sometimes known as "Māori roads". The provisions in this act concerning roadways succeed earlier legislation to similar effect, the preceding statute being the Māori Affairs Act 1953.

4. Relevant sections of Part 14 of the *Māori Land Act 1993* are shown in Appendix 1. Of particular note is s286(1) which states that "*The principal purpose of this Part is to facilitate the use and occupation by the owners of land owned by Māori by rationalising particular landholdings and providing access or additional or improved access to the land.*" This purpose has been expressly noted in some Māori Land Court decisions.

Roadways on Māori Land

5. Roadways on Māori land are not roads as defined in the Local Government Act 1974. They provide access over Māori land to other land (including Māori land) without alienating the title to the underlying land. The term "roadway" is used to distinguish them from roads; that is, roads in the sense of legal public roads vested in the Crown or local authorities. The roadway provisions of Te Ture Whenua Land Act apply to Māori land, general land owned by Māori, and any other land that is for the time being subject to Part 2 of the *Māori Affairs Restructuring Act 1989*.

6. The laying out of a roadway by the Māori Land Court confers on all persons the same rights of use as if it were a public road unless the order defines or limits the persons or classes of persons entitled to use the roadway, or defines or restricts rights of use.

Management of roadways

7. Responsibility for the formation and management of roadways on Māori land may be specified in the relevant Māori Land Court order, but otherwise seem to be a matter for the owners of the affected land. In some instances, a local authority may contribute to the formation and management especially if it provides public access (for example, to Public Conservation Land).

8. This contrasts with legal public roads, which are vested in fee simple in the relevant local authority and which are subject to a statutory regime for their management and protection in Part 21 of the *Local Government Act 1974*. Note also that state highways and government roads are not subject to the *Local Government Act 1974*.

9. Although the public have the same rights of use over Roadways on Māori Land as if it were a public road (unless specifically restricted by a Māori Land Court Order), there are no statutory provisions on such issues as public safety or damaging or obstructing a roadway as there are in the *Local Government Act 1974*. Neither is there a legislated regime dealing with fences and cattle stops across roadways on Māori land as there is with legal public roads. There are no statutory offences prescribed in respect of Māori roadways, and no administrative authority responsible for protecting the public's right of way.

Establishment and cancellation

10. Māori roadways are created by orders of the Māori Land Court. The Court may make subsequent orders amending the original order and may cancel roadways. In some early instances the roadway may be referred to only as an annotation in the margin of a partition order, but such annotations have nevertheless been held to be valid.

Scope to become legal roads

11. There is provision in the Act for the Governor-General to declare by proclamation a roadway to be road, but only in accordance with a recommendation made by the court to the Minister of Transport. There seems to be no other restriction on making such a declaration, but it would be likely to raise such issues of owner consent and compensation.

Extent and location

12. Māori roadways are generally registered on titles and shown in the cadastre. There are a significant number in the East Coast region of the North Island. Some are formed; some are not. Some early Māori Land Court decisions have not yet been registered and any roadways that they may have been created are not in the cadastre. Any access restrictions on them will be specified in the relevant Māori Land Court order.

13. Information about the location and ownership of Māori land is available on the Māori Land Court GIS website http://www.maorilandonline.govt.nz. Roadways on Māori

land, provided they have been registered with LINZ, can be located by searching either on the relevant block name or the Title number. They can also be located by zooming in on the relevant area. They may also be able to be viewed on the Walking Access Mapping System (WAMS).

14. The Commission does not identify roadways on Māori land in WAMS as land that can be expected to be open to public access, as this would require extensive research into access conditions on each roadway. We do however assist with public enquiries on a case-by-case basis by contacting the Māori Land Court support Staff at the Department of Justice and requesting information relating to the particular roadway.

15. Information about any access restrictions requires a search of the relevant Māori Land Court order and https://www.maorilandcourt.govt.nz/legislation-decisions/.

Public access

16. In some instances, access rights have been restricted so it cannot be assumed that Māori roadways are open to public access. If access has not been restricted by an order of the Māori Land Court the public have the same right to pass and re-pass on Māori roadways as they do on legal public roads. Where access is restricted the public may be able to use a road at the invitation of those who have access rights.

17. In very old cases written up as a memorial on the Partition Order, there's little more than the creation of the roadway identifying the servient and dominant tenements. The plan annexed to the Partition Order usually tells more of the story. Later the Māori Land Court moved to drawing a separate order, but many of those were brief with little in the way of restrictions or rights expressed. In more recent times, the orders are more comprehensive and often set out who may use the road and who is responsible for its maintenance.

18. Some roadways on Māori land are unformed, and these give rise to similar issues to those that arise with unformed legal roads. For example, the roadway may traverse terrain that is not practically accessible, especially by motor vehicles. There may also be owner sensitivities. In addition to checking the legal status and location of such a roadway we advise potential users to discuss their intentions with the owners of the underlying land. This may not be straightforward, given the complex ownership of some Māori land.

Recommendation

19. It is recommended that the Board:

    a) **note** the contents of this report.

Ric Cullinane
Chief Executive I Te Tumuaki

Prepared by:
Lynda Edwardson
Operations Manager (Acting) I Te Kaiwhakahaere Rauemi

Attachments:
Appendix 1: 12 August 2013 Board paper *Roadways on Māori land*

Appendix 1

NEW ZEALAND WALKING ACCESS COMMISSION
BOARD REPORT

12 August 2013

Roadways on Māori land

Purpose

1. This report is to inform the Board about Māori roadways.

Strategic context

2. The Commission should have a good understanding of the various types of walking access that are potentially available to the public and of the legal status of the underlying land. This will enable the Commission to carry out its functions of providing advice on walking access and facilitating resolution of disputes about walking access it is important that Māori land has different characteristics from general or public land and has special legislated provisions for access to it. To date the Commission has done only limited research into access issues that are unique to Māori land. This report deals with one of these issues.

Background

3. This report responds to a request from the Chairman for a briefing on Māori roadways. This issue has not been explored in any depth previously as the Commission has not received public enquiries about the use of Māori roadways.

4. Te Ture Whenua Māori Act 1993 (or Māori Land Act 1993) provides for the laying out of roadways on Māori land by the Māori Land Court. They are sometimes known as "Māori roads". The provisions in this act concerning roadways succeed earlier legislation to similar effect, the preceding statute being the Māori Affairs Act 1953.

5. The report describes what they are, the access rights that they provide, who manages them, and how they are created and disposed of. It also explores the availability of data on the location of Māori roadways.

6. Relevant sections of Part 14 of the Māori Land Act 1993 are shown in Appendix 1[1]. Of particular note is s286 (1) which states that "*The principal purpose of this Part is to facilitate the use and occupation by the owners of land owned by Māori by rationalising particular landholdings and providing access or additional or improved access to the land.*" This purpose has been expressly noted in some Māori Land Court decisions.

[1] All appendices are enclosed separately due to their size.

7. As further background and context Appendix 2 is an extract from a judgement of the Māori Land Court dated 30 June 2010 relating to the Utakarra 7 Block that reviews the various means, both historical and current by which rights of way and roadways over Māori land may be established.[2] This illustrates the potential complexities that can arise in particular circumstances.

8. Appendix 3 is an extract from another Māori Land Court judgement relating to Oharotu 4 (and other blocks) dated 30 July 2010 that sets out in summary the history of the legislation relating to Māori roadways.[3]

What they are

9. Māori roadways are not roads as defined in the Local Government Act 1974. Rather they are designed to provide access to Māori, general land or Crown land over Māori land without alienating the title to the underlying land. The term "roadway" is used to distinguish them from roads; that is, roads in the sense of public highways vested in the Crown or local authorities. The roadway provisions of Te Ture Whenua Land Act apply to Māori land, general land owned by Māori, and any other land that is for the time being subject to Part 2 of the Māori Affairs Restructuring Act 1989.

10. The laying out of a roadway by the Māori Land Court confers on all persons the same rights of user as if it were a public road unless the order defines or limits the persons or classes of persons entitled to use the roadway, or defines or restricts persons' rights of user.

Management of roadways

11. Responsibility for the formation and management of Māori Roadways may be specified in the relevant Māori Land Court order, but otherwise seems to be a matter for the owners of the affected land. In some instances, a local authority may contribute to the formation and management of a Māori roadway, especially if it provides public access.

12. This contrasts with legal roads, which are vested in fee simple in the relevant local authority (with the exception of state highways and government roads), and which are subject to a statutory regime for their management and protection in Part 21 of the Local Government Act 1974.

13. Although the public have the same rights of user, unless specifically restricted by a Māori Land Court Order, over a Māori roadway as if it were a public road, there are no statutory provisions on such issues as public safety or damaging or obstructing a roadway as there are in respect of roads in the Local Government Act 1974.

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[2] Māori Land Court reference 7 TAITOKERAU MB 71

[3] Māori Land Court reference 7 Taitokerau MB 235

14. Nor is there legislated regime dealing with fences and cattle stops across Māori roadways as there is with legal roads.

15. Further, there are no statutory offences prescribed in respect of Māori roadways, and no administrative authority responsible for protecting the public's right of way.

How they are made and cancelled

16. Māori roadways are created by orders of the Māori Land Court. The Court may make subsequent orders amending the original order, and may cancel roadways. In some early instances the roadway may be referred to only as an annotation in the margin of a partition order, but such annotations have nevertheless been held to be valid.[4]

Scope to become roads

17. There is provision in the Act for the Governor-General to declare by proclamation a roadway to be road, but only in accordance with a recommendation made by the court to the Minister of Transport. There seems to be no other restriction on making such a declaration, but it would be likely to raise such issues of owner consent and compensation.

Extent and location

18. Māori roadways are in general registered on titles and shown in the cadastre. There are a significant number on Māori land in the East coast of the North Island. Some are formed; some are not. Some early Māori Land Court decisions have not yet been registered and any roadways that they may have created will not therefore be in the cadastre. Any access restrictions on them will be specified in the relevant Māori Land Court order.[5]

19. Information about the location and ownership of Māori land is available on the Māori Land Court GIS website http://www.Māorilandonline.govt.nz. Roadways, provided they have been registered with LINZ, can be located by searching either on the relevant block name or the CT number. The can also be located by zooming in on the relevant area. In addition, they may also be able to be viewed on the Walking Access Mapping System (WAMS).

20. Information about any access restrictions requires a search of the relevant Māori Land Court order. The orders and assistance with them is available in the Māori Land

[4] Comment from MLC staff: "In very old orders, the roadway can be a simple memorial written up the margin of the Partition Order rather than a stand-alone order. Now we always draw a separate order, and have done for some decades. It's the old ones that get a little tricky. The Māori Land Court's Advisory teams around the country are the people to lodge any enquiries with and they will check it out and provide copies of the orders."

[5] Comment from MLC staff: "The Māori Freehold Land Registration Project made huge inroads into reconciling the Māori Land and LINZ titles but there are a few stragglers that have either slipped under the radar or are still being investigated. Roadways are tricky and a bunch found their way into the "too hard" basket. That basket is being worked through. But nearly all are. Another point to be wary of is that Māorilandonline is not fully in tune with the LINZ titles, in addition to the remaining MFLRP work - some Parcel IDs have been inadvertently detached from Māorilandonline and the MLC is working with LINZ and on its own programme to identify where and how that has happened and to correct those we can. Unfortunately, this increases the differential between Māorilandonline and LINZ beyond just the remaining MFLRP work. This means that it is always necessary to search the LINZ title and to refer an enquiry to the court any time you're unsure."

Court Registry offices for the area they are responsible for. The orders may also be found by searching the judgements on the Māori Land Court part of the Department of Justice website (www.justice.govt.nz).

21. A point of interest is that a short stretch (about 800 metres) of the East Cape road is on part of a Māori roadway (part of the Marangairoa B road line). The remainder of the East Coast roads is legal road. We understand that there are other examples of this elsewhere.

Public access

22. If access has not been restricted by an order of the Māori Land Court the public have the same right to pass and re-pass on Māori roads as they do on legal roads. In some instances access rights have been restricted so it cannot be assumed that Māori roadways are open to public access. Where access is restricted the public may be able to use a road at the invitation of those who have access rights.

23. In very old cases written up as a memorial on the Partition Order, there's little more than the creation of the roadway identifying the servient and dominant tenements - in fact the plan annexed to the Partition Order usually tells more of the story. After that era the Māori Land Court moved to drawing a separate order, but many of those were brief with little in the way of restrictions or rights expressed. In more recent times, the orders are more comprehensive and often set out who may use the road, and who is responsible for its maintenance.

24. Some Māori roadways are unformed, and these give rise to similar issues to those that arise with unformed legal roads. For example, they may traverse terrain that is no practically useable, especially by motor vehicles. There may also be owner sensitivities, so in addition to checking the legal status and location of such a roadway and potential user would be well advised to discuss their intentions with the owners of the underlying land. This may not be straightforward, given the complex ownership of some Māori land.

25. Access, including public access, over Māori land may also be provided by easements made under s315 of Te Ture Whenua Land Act 2003. This may be a suitable means of providing for new walking access over Māori land should this become desirable and fit within the Commission's policies for acquiring new walking access.

26. Section 287 of Te Ture Whenua Act 2002 confers on the Māori Land Court exclusive jurisdiction to make easements over Māori land.[6] So the making of an easement for walking access (including a walkway easement) over Māori land would have to be done through the Māori Land Court.

[6] **Jurisdiction of courts** 287 (1) Subject to subsection (3), the Māori Land Court shall have exclusive jurisdiction to make partition orders, amalgamation orders, aggregation orders, and exchange orders in respect of Māori land, and to grant easements and lay out roadways over Māori land.

Conclusion

27. We will use the material in this report as a basis for dealing with and providing advice on any enquiries it may receive on the use of Māori roadways for walking access and activities associated with walking access.

28. We do not at present intend to identify Māori roadways in WAMS as land that can be expected to be open to public access, as this would require research into any access conditions on each Māori roadway. We do intend, as resources permit, to resume discussions with the Māori Land Court support Staff at the Department of Justice on the scope for co-operating on the use and content of our respective GIS websites.

Recommendation

29. It is recommended that the board:

    b) **note** the contents of this report.

Mark Neeson
Chief executive

Attachments:
Appendix 1: Extract from Part 14 the Māori Land Act 1993
Appendix 2: Extract from the Utakura 7 Block decision of the Māori Land Court
Appendix 3: Extract from the Oharotu 4 (and other blocks) decision of the Māori Land Court

Appendix 1

Extract from Part 14 the Māori Land Act 1993

285 Interpretation

In this Part the term *land to which this Part applies* means—

(a) Māori land; and

(b) General land owned by Māori; and

(c) any other land that is for the time being subject to Part 2 of the Māori Affairs Restructuring Act 1989.

Compare: 1953 No 94 ss 173(2), 186(1)

286 Purpose of this Part

(1) The principal purpose of this Part is to facilitate the use and occupation by the owners of land owned by Māori by rationalising particular landholdings and providing access or additional or improved access to the land.

(2) Where it is satisfied that to do so would achieve the principal purpose of this Part, the court may make partition orders, amalgamation orders, and aggregation orders, grant easements, and lay out roadways in accordance with the provisions of this Part.

316 Court may lay out roadways

(1) For the purpose of providing access, or additional or improved access, the court may, by order, lay out roadways in accordance with the succeeding provisions of this section and of this Part.

(2) For the purpose of providing access, or additional or improved access, to any land to which this Part applies, the court may lay out roadways over any other land.

(3) For the purpose of providing access, or additional or improved access, to any land other than land to which this Part applies, the court may lay out roadways over any land to which this Part applies.

(4) Any order laying out roadways may be a separate order, or may be incorporated in a partition order or other appropriate order of the court.

Compare: 1953 No 94 ss 415(1), (2), 418–420; 1975 No 135 s 16(1)

317 Required consents

(1) The court shall not lay out roadways over any Māori freehold land unless it is satisfied that the owners have had sufficient notice of the application to the court for an order laying out roadways and sufficient opportunity to discuss and consider it, and that there is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter.

(2) The court shall not lay out roadways over any customary land without the consent of an agent appointed by the court pursuant to Part 10 to represent the interests of those persons who may be entitled to apply for a freehold order in respect of the application for an order laying out roadways.

(3) The court shall not lay out roadways over any General land without the consent of each owner.

(4) The court shall not lay out roadways over any Crown land without the consent of the Commissioner of Crown Lands.

(5) The court shall not lay out roadways connecting with any State highway without the consent of the New Zealand Transport Agency and the territorial authority for the district in which the connection would be effected.

(6) The court shall not lay out roadways connecting with any public road without the consent of the territorial authority for the district in which the connection would be effected.

(7) Notwithstanding anything in subsections (5) and (6), where a roadway is laid off as part of a partition to which section 301 applies, a separate consent to the laying out of the roadway shall not be required from the territorial authority for the district in which the land to be partitioned is situated.

318 Effect of laying out roadway

(1) Subject to the provisions of subsection (2), the laying out of a roadway over any land shall confer on all persons the same rights of user as if it were a public road.

(2) In any order laying out a roadway or in any subsequent order, the court may define or limit the persons or classes of persons entitled to use the roadway, and may define or restrict their rights of user in such manner and to such extent as it thinks fit.

(3) In any order laying out a roadway or in any variation of that order, the court may impose conditions as to the formation or fencing of the roadway or as to any other matter that it thinks fit, and may suspend or limit the right to use the roadway until those conditions have been complied with.

(4) The laying out of a roadway over any land shall not affect the ownership of the land comprised in the roadway, or its description as Māori land, or Crown land, or General land (as the case may be).

(5) Notwithstanding anything in this Part, no private road or private way shall be laid out within the district of a territorial authority otherwise than in accordance with sections 347 and 348 of the Local Government Act 1974.

Compare: 1953 No 94 s 416; 1975 No 135 s 16(1); 1978 No 43 s 3(4)

319 Compensation in respect of roadway

(1) On laying out a roadway under this Part, the court may determine that compensation shall be payable in accordance with the terms of the order

laying out the roadway, and subject to such conditions (if any) as may be specified in the order.

(2) An order for the payment of compensation shall specify the amount of compensation to be paid, the person or persons by whom the same shall be payable, and the person or persons to whom or for whose benefit the same shall be paid.

(3) Any such person may waive that person's entitlement to compensation under the court's order.

(4) On the variation or cancellation, pursuant to section 322 or any other authority, of any order in its relation to a roadway, the court may make such incidental provisions in relation to compensation or any other matters as it considers equitable between the owners of the land comprised in the roadway and any other persons.

(5) Any compensation payable pursuant to an order of the court under this section may, in whole or in part, be charged by the court on any land for the benefit of which the roadway has been laid out.

Compare: 1953 No 94 s 417

320 Roadways may be declared roads or streets

(1) The Governor-General may, by Proclamation made in accordance with this section, declare that the land comprised in any roadway laid out by the court under this Part or under any corresponding former enactment shall be a road or street.

(2) No roadway shall be declared a road or street pursuant to this section except in accordance with a recommendation made by the court to the Minister of Transport.

(3) In making a recommendation for the purposes of this section, the court shall describe the roadway with sufficient particularity to enable its boundaries to be accurately determined.

(4) No roadway shall be declared a road or street pursuant to this section without the consent in writing of—

(a) the New Zealand Transport Agency and the territorial authority for the district in which the land is situated, in the case of a State highway or a proposed State highway; or

(b) the territorial authority for the district in which the road or proposed road is situated.

(5) On the date of the publication in the *Gazette* of a Proclamation issued under subsection (1), or on such later date as may be specified in that Proclamation as the date when it shall have effect, all land to which the Proclamation relates shall vest as a road in the territorial authority within whose district the land is situated, but otherwise free from all reservations, restrictions, trusts, rights, titles, estates, or interests of any kind.

(6) The provisions of section 57 of the Public Works Act 1981 shall, as far as they are applicable and with any necessary modifications, apply to any Proclamation issued under this section.

Compare: 1953 No 94 s 421; 1953 No 118 ss 2(1), 43(3); 1954 No 76 s 413(6); 1972 No 132 s 8(1); 1972 No 135 s 10(2); 1978 No 43 s 3(4)

321 Land that has been used but not set apart as a road may be declared a road or street

(1) Where the court is satisfied that any Māori freehold land has in fact been used as a roadway though it may not have been declared to be a roadway, it may make a recommendation to the Minister of Transport that the land so used be declared to be a road.

(2) Any such recommendation may be made subject to the condition that compensation by the Crown, or by a territorial authority, or by any person interested, be paid to or on behalf of any person or persons having an estate or interest in the land.

(3) On compliance with the conditions (if any) imposed by the court, the land to which the recommendation relates may be declared to be a road in accordance with the provisions of section 320 as if it were a roadway laid out by the court.

322 Court may cancel roadways

(1) Where any roadway that has been laid off by an order of the court, whether before or after the commencement of this Act, has not been declared to be a road, the court may, on application, vary or cancel that order in so far as it relates to the roadway.

(2) Where application for the variation or cancellation of an order under this section is made by any person other than the Chief Surveyor of the district in which is situated the land over which the roadway has been laid off, notice of the variation or cancellation of the order shall be given to the Chief Surveyor by the Registrar.

(3) The court may vary or cancel any order under this section notwithstanding that, after the order was made, the land over which the roadway was laid out ceased to be land to which this Part applies.

323 Powers of court on cancellation of roadway

(1) Where, pursuant to section 322, the court cancels an order for the laying out of any roadway for which a separate instrument of title exists, the court may cancel that instrument of title and may amend any other instrument of title so as to include in it the whole or any part of the land comprised in the roadway; and the land so included in any instrument of title shall thereupon vest in the owner or owners as if it had been originally included in it, and shall become subject to any reservations, trusts, rights, titles, interests, or encumbrances to which the land comprised in that instrument of title is then subject.

(2) Where the land comprised in any roadway is not included in a separate instrument of title, the owners shall thereafter hold the land freed from its reservation as a roadway.

(3) The foregoing provisions of this section as to the cancellation of orders shall, as far as they are applicable and with any necessary modifications, apply to the variation pursuant to section 322 of an order of the court as to roadways.

(4) Any order made by the court under this section shall, upon production, be registered by the District Land Registrar or the Registrar of Deeds, as the case may be; and the District Land Registrar is hereby authorised to make such amendments in any instrument of title as may be necessary to give effect to any order under this section.

Compare: 1953 No 94 s 424

324 Unused road or street over Māori land may be stopped by court

(1) This section applies to roads that have previously been or that may hereafter be constituted over any Māori freehold land, irrespective of the terms or descriptions used or the procedure adopted when they were constituted as roads.

(2) With the consent in writing of the Minister of Transport and of the authority having the control of the road undersection 317 of the Local Government Act 1974, the court may make an order closing the road or any defined portion of it, and every such order shall have effect according to its tenor.

(3) By the same or a subsequent order, the court, subject to such terms and conditions as it thinks proper with respect to payment or as to any other matter, may vest the land comprised in the road or portion of the road so closed in such person or persons as it may determine, or may amend any existing title to any Māori land so as to include in it the whole or any part of the road or portion of the road that has been closed.

(4) The land so included in any instrument of title shall thereupon vest in the owner or owners as if it had been originally included in it, and shall become subject to any reservations, trusts, rights, titles, interests, or encumbrances to which the land comprised in that instrument of title is then subject.

(5) Any order made under this section shall, upon production, be registered by the District Land Registrar or the Registrar of Deeds, as the case may be, and where necessary the District Land Registrar shall amend any certificate of title so as to conform to the amendments made by the court under this section in any existing instrument of title.

325 Court may make vesting orders for lands comprised in roads or streets stopped otherwise than under foregoing provisions

(1) Where any road or portion of a road has previously been or is hereafter closed pursuant to any authority other than this Act or an Act repealed by this Act, the court may, on the application of the Minister of Transport, or of the territorial authority having control of the road at the time of closure, make a

vesting order vesting the whole or any portion of the land comprised in the road or portion of the road that has been closed in the owner for the time being of any adjoining land that, when the road was constituted, was Māori freehold land or General land owned by Māori.

(2) Any land vested pursuant to this section shall become subject to any reservations, trusts, rights, titles, interests, or encumbrances to which the land with which it is incorporated is then subject.

(3) The provisions of subsection (1) shall extend to apply in any case where the road was laid out over Crown land, and the land adjoining the road or portion of the road that has been closed is Māori freehold land or General land owned by Māori.

(4) By the same or a subsequent order, the court may amend any existing title to include in it the land comprised in the road or portion of the road that has been closed, and the District Land Registrar is hereby authorised to make all necessary entries or amendments in any certificate of title or register.

(5) Unless the court otherwise orders, any land that is vested in any Māori pursuant to this section shall thereupon become Māori freehold land.

Compare: 1953 No 94 s 426; 1964 No 46 s 11(1); 1975 No 135 s 16; 1978 No 43 s 3(4)

326 Alienation of land to include alienation of interest in roadway giving access to that land

Appendix 2

Extract from the Utakura 7 Block decision of the Māori Land Court

Methods of creation of rights of way and roadways in respect of Māori land

[13] Before deciding whether or not the right of way and roadway should be depicted on the computed plan it is necessary to understand the methods by which rights of way and roadways could be created over Māori land at law. What follows is not intended to be an authoritative treatise on the topic. Nevertheless, as the two issues requiring my direction regularly arise in relation to other titles and title plans within the Court's jurisdiction, I do attempt a complete sketch of the topic.

[14] Rights of way could be created:

a) By order of the Māori Land Court;
b) By conveyance, depending on the particular Native Land legislation at the time and requirements as to confirmation or noting by the Court;
c) By statutory implication under, for example, s 168 of the Land Transfer Act 1952 on the deposit of a subdivision of land.

[15] Roadways and roads could, in theory at least, be created by five methods:

(1) By dedication;
(2) Under the Public Works legislation;
(3) By the Governor taking or proclaiming a roadway under the Native land legislation;
(4) By order of the Māori Land Court;
(5) Upon deposit of a subdivision plan under s 238 of the Resource Management Act 1991 and its predecessors.

[16] I do not include in my discussion the doctrine of prescriptive easements. The limitations of the doctrine in relation to Māori customary land and Māori freehold land are thoroughly discussed in *Riddiford v Te Whaiti – Pukaroro No1* (1997) 11 Takitimu Appellate MB 170 (11 ACTK 170).

Rights of way

Order of the Māori Land Court

[17] Since the 1909 Native Land Act ("1909 Act") the Court has had the express power to create rights of way separately from roadways, see:

(1) Section 117(4) of the Native Land Act 1909.
(2) Section 48(2) of the Native Land Amendment Act 1913.
(3) Sections 480, 481, 483 and 485 of the Native Land Act 1931.

(4) Section 30(j) of the Māori Affairs Act 1953.
(5) Section 315 of Te Ture Whenua Māori Act 1993.

Conveyance

[18] Depending on the legislation at the time, a right of way could be created by conveyance under the deed system or under the land transfer system in relation to Māori freehold land. Some legislation may have prevented or restricted a right of way being created in this manner. Under the 1993 Act it appears that there was no such prohibition – see *Matoa Trust Land* (2007) 113 Whangarei MB 135 (113 WH 135).

Statutory implication

[19] A right of way may be implied in relation to land under the land transfer system upon deposit of a subdivision plan depicting any roads. This is currently provided for in s 168 of the Land Transfer Act 1952:

> **168 Deposit not to operate as dedication of roads**
>
> (1) The deposit of a plan of subdivision of any land shall not operate as a dedication for public purposes of roads shown on that plan, but a right of way over all such roads shall be appurtenant to every portion of the land in that subdivision, unless expressly excepted, and except to the extent to which the registered proprietor of any estate in fee simple in the land or any part thereof, with the consent of every person having a registered interest in the land or part, has disclaimed such a right of way by instrument in writing duly signed in the presence of a witness and lodged with the Registrar. Upon receipt of any such disclaimer, the Registrar shall record on the relevant plan and on the register copy of the relevant certificate of title that this subsection has ceased to apply to the land therein to the extent specified in the disclaimer.
>
> (2) Every instrument in which land is described by reference to a deposited plan shall take effect, according to the intent and meaning thereof, as if the plan was fully set out there on.

[20] This provision is discussed in detail in *Burke v McLeod* [2007] 1 NZLR 694. The critical issue there was whether the private road depicted on the subdivision plan was deemed to be part of the subdivision.

[21] Section 168 would appear to apply to Māori freehold land. Obviously it only applies on deposit of a subdivision plan. The deposit of a partition plan prior to the 1993 Act may have triggered s 168 – see s 432 of the 1953 Act – though a hapu partition is not a subdivision under the 1993 Act – see s 301.

Roadways and roads

Dedication

[22] Dedication is the process at common law whereby a road could be created by dedication of the right of passage to the public by the owner of the land followed by acceptance by public use of the land as a public highway: Hinde McMorland & Sim, *Land Law in New Zealand* (Student ed, Lexis Nexis, Wellington, 2003) Vol 1 at paragraph 9.002(e). There must be *animus dedicandi*, of which Moller J in *Echo Lands Farm Ltd v Powell* [1976] 1 NZLR 750 (p 757) said:

> ...the question whether, in any particular case, there have been a dedication and an acceptance as a question of fact and not of law; that dedication necessarily presupposes an intention to dedicate – there must be *animus dedicandi*; that such an intention may be openly expressed in words or writing, but, as a rule, it is a matter o[f] inferences from evidence as to the acts and behaviour of the person concerned when viewed in the light of all the surrounding circumstances...

[23] Nevertheless, it is doubtful whether the doctrine of dedication applies to Māori land. In *Gibbs v Pickford* (1913) 33 NZLR 481 Chapman J considered that there were considerable difficulties in a claim of dedication in relation to either Māori customary land or Māori freehold land. In *Dean v Wootten – Koheroa 89B4* (1964) 2 Taitokerau Appellate MB 17 (2 APWH 17) the Māori Appellate Court agreed with the lower Court's finding that the doctrine of implied dedication would be difficult to establish in relation to Māori land. The lower Court (24 Auckland MB 235) adopted the reasoning in *Gibbs v Pickford* that:

> ...dedication must be traced to the will of the owners: and in the case of Māori lands, the ownership of which is in a succession of persons...there is no owner in the sense of which the term is understood when determining whether there has been a dedication by owners.

[24] Section 13 of the Native Land Amendment and Native Land Claim Adjustment Act 1928 (the predecessor to s 422 of the 1953 Act and s 321 of the 1993 Act), which enables the Court to make a recommendation that land actually used as a public road be declared to be a road, may have been enacted in part to fill the perceived "gap" in the law arising from the doctrine of dedication not applying to Māori land. Certainly, it was enacted to address the common problem of roads being shown on plans of Māori land, formed and used by the public but without any legal basis (see my discussion below in relation to *Re Part Lot 28B Parish of Rangitaiki (1979) 6 Waiariki Appellate MB 20 (6 AP 20))*. Set out below is s 321 of the 1993 Act:

> **321 Land that has been used but not set apart as a road may be declared a road or street**
>
> (1) Where the Court is satisfied that any Māori freehold land has in fact been used as a roadway though it may not have been declared to be a roadway, it may make a recommendation to the Minister of Transport that the land so used be declared to be a road.

(2) Any such recommendation may be made subject to the condition that compensation by the Crown, or by a territorial authority, or by any person interested, be paid to or on behalf of any person or persons having an estate or interest in the land.

(3) On compliance with the conditions (if any) imposed by the Court, the land to which the recommendation relates may be declared to be a road in accordance with the provisions of section 320 of this Act as if it were a roadway laid out by the Court.

Public Works legislation

[25] Since the Public Works Lands Act 1864 ("1864 Act") Māori freehold land has been able to be taken for the purposes of roads. The taking was effected by the Governor by Order in Council published in the *Government Gazette*: s 4 of the 1864 Act. Following the Immigration and Public Works Act 1870 ("1870 Act"), the taking was effected by proclamation published in the *New Zealand Gazette*: s 49 of the 1870 Act. The same process was adopted in all subsequent Public Works Acts. Accordingly, there must be a gazettal to prove the taking of Māori freehold land for roading purposes under the Public Works legislation.

[26] But there is a further, less known, power whereby the Crown can take Māori freehold land as a road and which apparently bypasses the need for a gazettal and, surprisingly, the requirement to pay compensation.

[27] Section 43 of the Government Roading Powers Act 1989 ("1989 Act") is, on its face, an interpretation section for the purposes of Part 4 of the Act which is concerned with roading. However, s 43(1) contains a definition of "road" which also grants to the Minister of Transport the power to authorise the taking of land that has been used and paid for as a public road by registering a plan with LINZ:

43 Interpretation

(1) In this part –

...**road** means a public highway, whether carriageway, bridle path, or footpath; and includes the soil of –

- Crown land over which a road is laid out and marked on the record maps:
- land over which right of way has in any manner been granted or dedicated to the public by any person entitled to make such grant or dedication:
- land taken for road under the provisions of this Act, the Public Works Act 1981, or any other Act or Provincial Ordinance formerly in force:

- **land over which a road has been or is in use by the public which has been formed or improved out of the public funds, or out of the funds of any former province, or out of the ordinary funds of any local authority, for the width formed, used, agreed upon, or fenced, and a sufficient plan of which, approved by the Chief Surveyor of the land district in which such road is situated, has been or is hereafter registered by the District Land Registrar against the properties affected by it; and the Registrar is hereby authorised and required to register any such plans accordingly, anything in any other Act notwithstanding, when the plans are presented for registration by or on behalf of the Minister:**

- land over which any road, notwithstanding any legal or technical informality in its taking or construction, has been taken, constructed, or used under the authority of the Government of any former province, or of any local authority and a sufficient plan of which is registered in the manner provided for in paragraph (d),-

and, unless repugnant to the context, includes all roads which have been or may hereafter be set apart, defined, proclaimed, or declared roads under any law or authority for the time being in force, and all bridges, culverts, drains, ferries, fords, gates, buildings, and other things thereto belonging, upon the line and within the limits of the road. (emphasis added)

[28] Under s 46(2) the Minister may by notice in the *Gazette* declare a road to be a Government road. Under s 44 all Government roads are vested in the Crown. Alternatively, it would seem, a road taken under s 43(1)(d) will be vested in the local authority: see s 316 of the Local Government Act 1974 ("1974 Act").

[29] As will be appreciated, s 43(1)(d) has the same aim as s 321 of the 1993 Act, that is, the legalisation as roads of land that has been used as a roadway or road. It appears to apply to Māori freehold land as much as to General land.

[30] I am not aware of the extent to which the Minister has used his powers under s 43(1)(d) or its predecessors to take Māori freehold land as a road. One of the impediments to using s 43(1)(d) in the past, as opposed to relying on s 321 of the 1993 Act, may have been that the majority of Māori freehold land did not have land transfer titles. Given that the Māori Freehold Land Registration Project will give rise to land transfer titles for all Māori freehold land, the Minister will have greater opportunity to exercise his powers under s 43(1)(d) rather than proceed via s 321. This has potentially significant consequences.

[31] First, s 43(1)(d) does not provide for any due process whereby owners of Māori freehold land would be notified of the Minister's intention and have a right to express a view. The Minister simply authorises the registration of the plan and LINZ must then register it.

[32] Second, and of greater significance, whereas under s 321 the Court can order compensation, there is no provision in the 1989 Act for the Crown or a local authority to pay compensation where the Minister exercises his powers under

s 43(1)(d). This appears surprising given the common law principle that the Crown cannot take land without paying compensation. That is to say nothing of the Treaty of Waitangi. But, as I read the 1989 Act, there is no provision for compensation in these circumstances and no reference back to the compensation provisions under the Public Works Act 1981 ("1981 Act"). Furthermore, the 1981 Act would not apply as the compensation provisions in Part 5 apply only to actions under that Act notwithstanding the broad definition of "public work".

[33] It seems to me that the failure to provide for compensation is unintentional. Section 43(1)(d) of the 1989 Act is not new. It can be traced back to the Public Works Act 1882 (see s 78) and is in all subsequent Public Works Acts. Part 4 of the 1989 Act, which includes s 43, replaced ss 121-132 and Parts 10, 11 and 12 of the 1981 Act. Section 121(1)(d) of the 1981 Act contained a more or less identical provision to s 43(1)(d). Importantly, where the Minister took land under s 121(1)(d) of the 1981 Act, the owners of the land may be entitled to compensation under s 60 of the Act. However, following the transfer of the power of the Minister from the 1981 Act to the 1989 Act, the compensation provisions did not follow across. Furthermore, unlike related legislation, the 1989 Act does not refer back to the compensation provisions in the 1981 Act – compare this with, for example, s 57 of the Electricity Act 1992 and s 154 of the Telecommunications Act 2001. Although the 1989 Act does not prohibit a claim at common law for compensation, the failure to provide for a scheme of compensation must surely be a flaw. At the conclusion of this judgment I raise this as an issue for further action.

Governor's powers in accordance with Native land legislation

[34] From the Native Lands Act 1862 ("1862 Act") until the Native Land Act 1909 the Governor had had the power to take Māori land for the purpose of roads, see:

(6) Section XXVII of the Native Lands Act 1862.
(7) Section LXXVI of the Native Lands Act 1865.
(8) Section 106 of the Native Land Act 1873.
(9) Section 93 of the Native Land Court Act 1886.
(10) Sections 70-72 of the Native Land Court Act 1894.
(11) Sections 387-394 of the Native Land Act 1909.

[35] From the Native Land Act 1931 ("1931 Act") onwards, the Governor-General no longer had the separate power to take Māori land for the purpose of roads. Instead, where the Court had by order created a road or road-line, then the Court could recommend that it be a public road and the Governor-General could then by proclamation proclaim it as a public road. Thus, it was a two-stage process. This was repeated in the 1953 Act and the 1993 Act, see:

(12) Sections 486 and 487 of the Native Land Act 1931.
(13) Section 421 of the Māori Affairs Act 1953.
(14) Section 320 of Te Ture Whenua Māori Act 1993.

[36] An in depth consideration of these provisions is not necessary for present purposes. However, one point is important. Prior to the 1909 Act the legislation simply referred to the Governor's power to "take" lands for roads. The legislation did not specify how that taking was to be effected (even though in respect of the parallel jurisdiction under the Public Works legislation such taking had to be effected by Order in Council published in the *Government Gazette* (between 1864 and 1870) and by proclamation published in the *New Zealand Gazette* (from 1870 onwards)). However, from the enactment of the 1909 Act any such taking by the Governor-General was to be by "Proclamation".

[37] It is not clear from the legislation how the Governor effected a taking of Māori land for the purposes of a road prior to the 1909 Act. Did it require an Order in Council? Was the Governor required to endorse a survey plan? Could the Surveyor-General or Chief Surveyor endorse a survey plan under the authority of the Governor? The answer is not clear. Fortunately, for the purpose of this decision I need not concern myself with those questions as the right of way and roadway first appeared on plans after the 1909 Act came into being and therefore, if the Governor's powers were relied on, a proclamation was required.

[38] The term "proclamation" was first defined in s 2 of the Interpretation Act 1888 as "a Proclamation made by the Governor under his sign-manual and the seal of the colony and gazetted." The definition has remained largely the same over the years, the Interpretation Act 1999 defined proclamation in s 29 as "a Proclamation made and signed by the Governor-General under the Seal of New Zealand and published in the *Gazette*." Accordingly, since the 1909 Act, any taking of Māori land for the purposes of a road or any declaration that a roadway laid out by the Court be a public road must be evidenced by a proclamation published in the *New Zealand Gazette*.

[39] The issue of proclamations has been discussed in a variety of decisions. In *Tua Hotene v Morrinsville Town Board* [1917] NZLR 936 the Supreme Court held that the failure of a Town Board to comply with mandatory provisions under the Public Works Act 1908 rendered a proclamation invalid. In *Boyd v Mayor of Wellington* [1924] NZLR 1174 the Court of Appeal concluded that the *Gazette* containing the proclamation was conclusive evidence that the proclamation had been properly and validly issued and that upon registration under the Land Transfer Act, indefeasible title arose. In *Upper Hutt City v Burns* [1970] NZLR 578 the Court of Appeal confirmed that the failure of the City of Upper Hutt to take certain land by proclamation under the Public Works Act meant that it did not take title to the land. The overall point to be gleaned from these decisions is that the act of making a proclamation, as evidenced in the *New Zealand Gazette*, is essential to establishing whether or not land has been taken by "proclamation".

Order of the Māori Land Court

[40] Since the Native Land Court Act 1886 ("1886 Act") the Court has had the power to create roadways by order, see:

(15) Sections 91 and 92 of the Native Land Court Act 1886.
(16) Section 69 of the Native Land Court Act 1894.
(17) Section 17 of the Native Land Act 1909.
(18) Sections 48-50 of the Native Land Amendment Act 1913.
(19) Sections 476-490 of the Native Land Act 1931.
(20) Sections 414-432 of the Māori Affairs Act 1953.
(21) Sections 315-326B of Te Ture Whenua Māori Act 1993.

[41] I also note that in the context of consolidation schemes undertaken by Commissioners or Judges of the Court, other provisions may apply, for example, s 162(8) of the 1931 Act.

[42] The question of whether the Court has made a roadway order was succinctly analysed by Judge Russell in the Māori Appellate Court in *Re Part Lot 28B Parish of Rangitaiki* (p 42):

> On the second ground the test of whether or not a Roadway Order has been made by the Māori Land Court is a very simple one. The first question is whether or not there is a signed and sealed Order of the Court. If there is not, then the question is whether or not there are records of an order having been made which is sufficient, to enable an order to be now drawn up, signed and sealed.

[43] I would add to the above two questions a third question; whether or not there is an order or record of an order having subsequently been made cancelling any such roadway order.

[44] It follows that the mere approval of a plan depicting a roadway or right of way by the Court does not in itself create the roadway or right of way: an express order is required.

[45] In regard to the question of cancellation of roadways, I note that in the course of ML 403297 being prepared and the survey staff wrestling with the question of the existence of the roadway, the suggestion was made by one of the survey staff to the Project staff (email dated 15 April 2008) that "where an order is made cancelling several titles and substituting one title that this would include cancelling any roadways unless they made specific reference to give access to a block not included in the amalgamation." The suggestion is that the 1974 title order may have cancelled any existing roadway order (if, indeed, such an order existed). I do not believe such a general proposition is correct. The legislation provides that on partition or amalgamation of titles the Court's order cancels any existing titles. It makes no stipulation that such order automatically cancels any existing roadway orders and so forth. In my view, that would require a separate and express order cancelling the roadway order under the relevant provisions, for example, s 423 of the 1953 Act or s 322 of the 1993 Act.

Upon subdivision

[46] Under s 238 of the Resource Management Act 1991 ("1991 Act"), upon inter alia deposit of a survey plan under the land transfer system any land shown as road to be vested in a local authority or the Crown automatically vests in the local authority or Crown as a public road. This provision replaced s 306(3) and (4) of the 1974 Act which was to similar effect. Consequently, a public road could be created over Māori land if a subdivision was effected but only upon the titles coming under the land transfer system. (Section 238 does not apply to a hapu partition as it is not a subdivision – see s 301 of the 1993 Act – though s 306 of the 1974 Act applied to partitions under the 1953 Act – see s 432 of the 1953 Act).

[47] The 1974 Act repealed *inter alia* the Counties Act 1956 ("1956 Act"), of which s 191(3) originally provided:

> **191 Council to have control of county roads**
>
> (3) All lines of roads or tracks passing through or over any Crown lands or Māori lands, and generally used without obstruction as roads, shall, for the purposes of this section, be deemed to be public roads, not exceeding sixty-six feet in width, and under the control and management of the Council, notwithstanding that any such lines of roads have not been surveyed, laid off, or dedicated in any special manner to public use.

[48] This subsection is referred to in *Re Rapaki Māori Roads* (1977) 53 South Island MB 302 (53 SI 302) which is discussed below. Unlike s 306 of the 1974 Act and s 238 of the 1981 Act, s 191(3) of the 1956 Act as originally enacted did not purport to take such lines of roads or tracks as public roads, but merely deemed them to be public roads for the purpose of s 191, which was concerned with the control, construction and maintenance of county roads. However, s 35(3) of the Counties Amendment Act 1961 introduced the automatic vesting of roads on deposit of survey plans – see also ss 191 and 191A of the 1956 Act as repealed and substituted by s 2 of the Counties Amendment Act 1972.

[49] Accordingly, since the Counties Amendment Act 1961, but with the exception of hapu partitions under the 1991 Act, on the deposit in the land transfer system of a survey plan of Māori freehold land that depicted roads to vest as public roads, the roads automatically vested in the local authority or the Crown as a public road.

Could the approval of a survey plan on its own create a road over Māori freehold land?

[50] A related issue that has vexed this Court and the Māori Appellate Court over the years is whether the mere approval of a survey plan of Māori land that depicts roads could thereby transform the roads into public roads. (This is not to be confused with the provisions of s 238 of the 1991 Act and its predecessors referred to above which relate to the deposit of a survey plan in

the land transfer system). In other words, did the Surveyor- General have a power independent of the Governor to take Māori land for roads?

[51] In *Reureu No 2 Roads* (1923) 10 Whanganui Appellate MB 420 (10 WGAP 420) the Native Appellate Court dismissed an application that was "ostensibly lodged to clear up the whole question of roads and ways and to test whether those shown on plans or in diagrams attached to orders were legal or not" on the basis that the issue was too general and beyond the jurisdiction of the Court. The Court annulled the decision of the lower Court which had held that, notwithstanding that plans submitted to the Court had depicted roadlines and rights of way, no such roadlines or rights of way had been created. (The Court did not consider whether the lower Court had jurisdiction to address the issue under the general jurisdictional provisions of s 24(1) of the 1909 Act (the equivalent of s 18(1)(a) of the 1993 Act)).

[52] In the 1970s Judge M C Smith of the Māori Land Court issued three decisions wherein he concluded that the approval by the Chief Surveyor of a survey plan of Māori land that depicted roads automatically transformed them into public roads.

[53] In *Re Block XVI Moeraki Survey District* (1971) 48 Southland MB 187 (48 SI 187) the applicant brought an application under s 161 of the 1953 Act alleging that the areas depicted as roads on a survey plan dated July 1889 were still Māori customary land. Those opposing the claim, including the Waitaki County Council and the Chief Surveyor, claimed that the areas were public roads. The background was that title to Moeraki block was investigated on 19 March 1887. The Court did not make any orders laying off roadways. The land was partitioned into 45 allotments as per the survey plan later filed dated July 1889. The plan was approved by Judge Mackay and signed by the Chief Surveyor on 17 June 1890.

[54] Judge Smith relied on s 96 of the 1886 Act. I set out ss 93 to 96 of that Act:

Public

93 From and out of land which has or may be granted under the provisions of any Act hereby repealed or repealed by "The Native Land Act 1873," of which shall be granted or become the subject of land transfer certificate under the provisions of this Act, or which is owned by Natives under Native Land Court certificate of title, or under memorial of ownership, it shall be lawful for the Governor, at any time hereafter, to take and lay off for public purposes one or more line or lines of road through the said lands, provided that the total quantity of land which may be taken, inclusive of any already taken, for such line or lines of road shall not exceed one- twentieth part of the whole.

The Governor may, at any time by indorsement on the Crown grant or on a

subsequent or other instrument of title or by deed, release the land the subject of such right therefrom, or from any part thereof.

But there shall not be taken under the authority of the preceding section any land occupied by any pa, village, or cultivation, or any buildings, gardens, orchards, plantations, or any burial or ornamental grounds, except subject to the provisions of "The Public Works Act 1882," and "The Public Works Act 1882 Amendment Act, 1884."

94

95 The powers hereby given as to public roads shall cease –

(a) As to land the subject of a grant or certificate issued under this Act, at the end of fifteen years from the date of such grant or certificate;

(b) As to grants issued under any Act hereby repealed at the time when such power would have ceased under such repealed Act.

96 Whenever any lines of road are surveyed and laid off on or over any Native lands, under the direction of the Surveyor-General, the site of such road shall be deemed to be a road dedicated to the public, and shall vest in Her Majesty.

[55] Judge Smith reasoned as follows (pp 188 and 189):

I apprehend the words "laid off" to mean simply "shown as such on the plan prepared pursuant to the surveyor".

The abovementioned plan bears the seal of the Māori Land Court and the signature of Judge Mackay and he has endorsed thereon the word "approved". The plan also bears the signature of Mr C W Adams, Chief Surveyor, and date June 17, 1890.

Whether it was the practice of the Surveyor-General in those days to direct specific surveys of Māori lands or whether he gave a delegated and general authority to his Chief Surveyor is not known, but in my view the approval and signature of the Chief Surveyor on the plan is abundant evidence of direction by the Surveyor-General. That the roads were "surveyed and laid off" is to my mind conclusively established by the plan, wherever the measurements and angles of the roads are shown with the usual detail.

Mr White also referred me to s 72 of the Native Land Court Act 1894 which contained provision similar to s 96 of the 1886 Act, and to s 191(3) of the Counties Act 1956. I think the latter provision is not relevant here as it refers to "lines of roads which have not been surveyed, laid off, or dedicated in any special manner to public use." If these areas ever were simply "lines of roads" that situation ceased when the plan was approved by the Judge and the Chief Surveyor because the effect thereof was that the areas became public roads vested in Her Majesty.

[56] In *Re Rapaki Māori Roads* Judge Smith dealt with a similar issue in relation to a survey plan giving effect to the division of lands in the Rapaki No 3 block in 1886. The application was to determine the status of the land under s 30(1)(i)

of the 1953 Act. The background was that on 30 November 1886 the Court made preliminary orders dividing Rapaki No 3 into 34 parcels to be confirmed after survey. On 8 December 1886 the Court confirmed its earlier orders. The Court did not make any orders laying off roadways. A survey plan was prepared in December 1886 and endorsed by Judge Mackay. It was signed by a Chief Surveyor on 5 January 1888 and deposited in the Survey Office. The survey plan showed the Lyttleton-Governors Bay Road and the roads the subject of the application to the Court. A partition plan (I assume this was a later plan) also showed the roadways as "not legal road."

[57] Judge Smith was faced with various opinions as to the status of the land. The district solicitor of the Department of Māori Affairs considered that the land was not a roadway as no order had been made by the Court and that s 422 of the 1953 Act was intended to remedy the situation. In 1970 the District Land Registrar at Christchurch was of the view that the land was Māori freehold land and that s 422 may also apply. He pointed out that s 191(3) of the 1956 Act deemed such roads to be public roads but did not make them public roads except for the purpose of legalising their control by the County Council. In 1971 the Commissioner of Works expressed the view that the land was a roadway laid off by the Court and that it could be legalised under s 421 of the 1953 Act. In 1977 the Chief Surveyor at Christchurch expressed the view that, although there were no instructions in relation to the roads when the survey was undertaken in 1886, he had treated the land as Māori roadways.

[58] Judge Smith considered the material "helpful", but nevertheless had to decide the matter in terms of the legislation. He reviewed the various Native Land Acts over the years and ultimately reached the same conclusion he had in relation to *Block XVI Moeraki Survey District* and held that s 96 of the 1886 Act applied with the effect that the lands depicted as roads in the survey plan automatically became public roads.

[59] In *Re Horowhenua XIB36 1E* (1978) 81 Otaki MB 304 (81 OTI 304) Judge Smith dealt again with this issue in relation to an application under s 423 of the 1953 Act to cancel a roadway. The background was that in 1904 the Court had partitioned Horowhenua XIB36 1E into six titles. However – and this is an important point of distinction from the two earlier cases referred to above – the Court also made various roadway and right of way orders to service the six titles. The partitions, roadways and rights of way were then defined on a plan approved by the Chief Surveyor on 2 May 1905 and approved by the Court on 25 May 1905.

[60] Judge Smith referred to ss 69 to 72 of the 1894 Act and concluded that s 72 applied and that the roads had thereby become public roads vested in the Corporation of the County of Horowhenua. Consequently, he dismissed the application to cancel the roadway. I set out below ss 69-72 of the 1894 Act:

PART VII PRIVATE ROADS

69. When upon an investigation of title of Native land, or upon partition, land has been or shall be ordered to be divided into several parcels under "The Native Land Court Act, 1886," or under this Act, each of such parcels shall be subject to such rights of private road for the purpose of access to other or others of such parts or parcels as may be ordered.

Such order may be made by the Court at the time when partition is ordered, or it may, on the application of any person interested therein, be made by the Court at any time within five years from the date of such partition.

PUBLIC ROADS

70. It shall be lawful for the Governor, at any time within fifteen years after the first issue of a certificate of title, memorial of ownership, or other instrument conferring title under "The Native Land Court Act, 1886," or any Act thereby repealed, or under the provisions of this Act, whether heretofore issued or hereafter to be issued for any land, to take and lay off for public purposes one or more line or lines of road through such land, excepting in cases where such power shall, under any statute heretofore or hereby repealed, lapse before the expiration of such period of fifteen years or shall have already lapsed; and provided further that such line or lines of road shall be laid off within ten years of the date of the issue of the certificate of title, memorial of ownership, or other instrument of title: Provided that the total quantity of land which may be taken, inclusive of any already taken, for such line or lines of road shall not exceed one-twentieth part of the whole. The Governor may at any time, by indorsement on the Crown grant or other instrument of title, or by deed, release the land the subject of such right therefrom, or from any part thereof. The foregoing power may be exercised notwithstanding that such land shall have ceased to be owned by Natives or by Natives and Europeans jointly.

71 There shall not be taken under the authority of the last preceding section any land occupied by any pa, village, Native cultivations, or burial-ground, except subject to the provisions of "The Public Works Act, 1882," and the several Acts amending the same.

72 Whenever any lines of road are surveyed and laid off on or over any land or Native land under the direction of the Surveyor-General, the site of such road shall be deemed to be a road dedicated to the public, and shall vest in Her Majesty. When any road is laid off along the boundary between land owned by Natives and land owned by Europeans, such road shall be taken equally from both such lands where practicable: Provided that the Governor shall have the right to lay off or take roads on or from the lands of both owners.

[61] In 1979 the Māori Appellate Court delivered its decision in *Re Part Lot 28B Parish of Rangitaiki*in relation to a similar roadway issue. The Court, comprising Judge Cull, Judge Russell and Judge Nicholson, declined to follow Judge Smith's approach in the above three judgments. I discuss the Court's judgment shortly. At this point I simply note that as a consequence of the Court's decision, the approach taken by Judge Smith in *Re Horowhenua XIB36 1*was questioned and ultimately overturned.

[62] In *Re Horowhenua XIB36 1E* Part (1981) 83 Otaki MB 119 (83 OTI 119) Judge Cull was faced with a further application to cancel the roadway similar to that which was earlier dismissed by Judge Smith. Judge Cull similarly dismissed the application for cancellation but disagreed with Judge Smith's conclusion that the land was a public road (pp 120-121):

> As to the question whether or not it is public road and with due respect to my learned brother Smith, I am inclined to attach greater weight to the provisions of section 61 *et seq*., of the Native Land Act 1894 which empowers the Judge of the Māori Land Court to direct that a survey shall be carried out. Section 396 of the Native Land Act 1909 follows in principle the provisions of section 61 and where a survey is requisitioned by the Court the Chief Surveyor is required forthwith to take the necessary steps to have it completed. I see no connection between this function of the Chief Surveyor and his function on direction from the Surveyor-General under section 72. The two matters in my view are quite separate and distinct and notwithstanding that the Chief Surveyor, as is his practice, has to sign all plans, the mere fact of signing is not an implied authority from the Surveyor-General which could convert all roadlines on the plan into public roads. I am therefore of the view that this particular roadway is a roadway created under Order of the Māori Land Court, surveyed at the direction of the Court, is not a public road, and still remains Māori land.

[63] This decision was followed shortly after by a memorandum from Judge Smith (83 Otaki MB 124) pointing to the unsatisfactory situation of two Judges having diametrically opposed views on the interpretation of the relevant provisions of the 1894 Act and the status of the land and suggested that it may be appropriate for the issue to be determined by the High Court. Ultimately, the question of the status of Horowhenua XIB36 1E was resolved by way of an application under s 452 of the 1953 Act wherein the Chief Judge cancelled Judge Smith's 1978 determination and determined the land to be Māori freehold land and the subject of a roadway order under s 69 of the 1884 (sic – this should be "1894") Act: *Re Horowhenua XIB36 1E* (1986) 1986 Chief Judge's MB 160 (1986 CJ 160). The orders were made following a report from Judge McHugh (see also his memorandum of 12 May 1986).

[64] I would add, with respect, three further reasons why Judge Smith's conclusions were wrong.

[65] First, in relation to *Re Block XVI Moeraki Survey District* and *Re Rapaki Māori Roads* Judge Smith concluded that s 96 of the 1886 Act applied to both. But s 96 only applied to "Native lands". "Native land" was defined in s 3 of the 1886 Act as follows:

> "Native land" means land in the colony owned by Natives under their customs or usages, save under the title "Succession," where it means land so owned of which the title has been determined by the Court, and includes Native reserves:

[66] Accordingly, Native land for all purposes other than succession under the 1886

Act meant land held under aboriginal title or what we would today class as Māori customary land. But neither the Moeraki block nor Rapaki block were "Native lands" at the time the respective survey plans were prepared as title had been investigated by the Native Land Court. They were by definition "hereditaments" or "land" under the 1886 Act or what would today be classed as Māori freehold land. Section 96 did not apply. (I note that under the 1894 Act s 72 was expanded to apply to "any land or Native land" which included what we would now class as Māori customary land and Māori freehold land).

[67] Second, in relation to *Re Horowhenua XIB36 1E*, s 72 of the 1894 Act did not apply as the Court had made orders for rights of "private road" under s 69 of that Act and s 72 only applied to "lines of road". The Court did not have the power at that time to order "lines of road". Only the Governor could take and lay off "lines of road" under s 70.

[68] Which brings me to my third point, and that is that I think it is very doubtful that s 96 of the 1886 Act and s 72 of the 1894 Act were intended to give the Surveyor-General a power independent of the Governor to take any amount of Māori land – for there was no restriction in either ss 96 or 72 – for the purposes of roads. The Surveyor-General had no such similar powers in the earlier 1862 Act, 1865 Act or 1873 Act nor in the 1909 Act or later Acts. It seems illogical, and verging on capricious, for the various Acts up to the 1909 Act to grant the Governor a carefully worded and heavily prescribed power to take Māori land for roads - up to 5 per cent of the land, within a set number of years from investigation of title and which did not comprise pa, villages, cultivations, burial grounds and so forth (see, for example, ss 93 and 94 of the 1886 Act) - and yet the Surveyor-General purportedly had an unfettered power to do what he liked.

[69] In my respectful view, Judge Smith misconstrued the purpose of ss 96 and 72. They were not intended to grant the Surveyor-General an additional power to take roads. Rather, the sections were intended to be read in conjunction with the earlier sections relating to the taking of Māori land for public roads (ss 93-95 and ss 70 and 71 respectively) and are simply intended to set out the consequence of the Governor taking land for roads, that is, that the road is dedicated to the public and vested in the Crown. The term "laid off" was not a reference to the surveyor showing the roads on the plan but to the Governor's laying off under ss 93 and 70 respectively. Furthermore, the reference to it being "under the direction of the Surveyor-General" must in turn be a reference to the Surveyor-General acting on the Governor's instructions under those earlier sections.

[70] Returning to the Māori Appellate Court's decision in *Re Part Lot 28B Parish of Rangitaiki*, the appeal concerned a small strip of land 1 chain wide within the former Lot 28B1 Parish of Rangitaiki. The strip of land came to be known as the Ohuirehe Road. It was created on the partition of Rangitaiki Lot 28B. The partition came before the Native Land Court on 29 August 1907. It was adjourned for the owners to engage a surveyor. On 19 October 1907 a sketch plan was

produced to the Court which depicted the partitions including the Ohuirehe roadway. Partition orders were made but no roadway or other access orders were made. An appeal followed which left the partition unaltered and left the road question to be addressed in the future. No subsequent roadway order was made. On 16 September 1910 a survey requisition was issued under s 396 of the 1909 Act. Subsequently a survey plan was produced and approved by the Chief Surveyor on 15 November 1916.

[71] The appellants argued that s 70 of the 1894 Act applied and that the roads depicted in the survey plan were thereby public roads. The appellants also relied on the *Re Rapaki Māori Roads* decision of Judge Smith and asserted that s 72 also applied.

[72] The Māori Appellate Court unanimously rejected the appellants' arguments in separate decisions. The Court concluded that the land was Māori freehold land, that a roadway order had never been made, that the approval of the survey plan had not transformed the land into a public road, but that an application under s 422 of the 1953 Act was warranted as the land had been used as a road and it was appropriate that it now be declared to be a road.

[73] Judge Cull concluded that the Governor had not taken the land for roads under s 70 of the 1894 Act. He distinguished the case from in *Re Rapaki Māori Roads* as the survey plan had been prepared pursuant to s 396 of the 1909 Act (p 32):

> In accordance with the provisions of the Section the Chief Surveyor is simply carrying out the requisition of the Court and the Statute does not in my view vest him with any authority to create public roads or the like simply by executing a plan prepared under requisition from the Court.

[74] Judge Russell similarly rejected the reliance on s 72 of the 1894 Act. Referring to the District Land Registrar's view that Ohuirehe Road was not a legal road, Judge Russell agreed (p 40):

> I do not, however think that the District Land Registrar is wrong. A power to take land for road is one that must be exercised in strict compliance with the authorising statute. If roads were to be taken under the authority of the statutes relied upon then I think that it would have been done by a plan prepared for this express purpose and showing clearly on its face that it was prepared for this purpose. At the very least there should be a narration on the plan relied upon to the effect that the road shown thereon were taken and laid off by direction of the Surveyor-General.

[75] Judge Nicholson arrived at the same conclusion as Judges Cull and Russell in reliance on the evidence (p 56):

> In the years 1907 (and with appeals) 1909 Lot 28B was divided upon partition and certain parts shown on the survey plans as roads were excluded from the areas in the partition orders. The practice of showing areas as roads was the general practice, the Court being enjoined when subdividing Māori freehold land to have

> regard, inter alia, to road access. Plans showing roads the area of the roads being excluded from the titles without any supporting Court order are quite a common feature of those times. In the case of Lot 28B there is no record of any Court order defining the roadway and no record of any warrant of the Governor nor action of the Surveyor-General under any statutory authority and the Ohuirehe roadway appears to me to be quite clearly Māori freehold land.

[76] Returning then to the question posed at the outset of this section, the case law is clear that the mere approval by the Chief Surveyor of a survey plan of Māori land that depicts roads does not thereby create public road unless there is clear evidence of the Governor having taken the land for the purpose of a road. I have real doubts that the Surveyor-General had an independent power to take Māori land for roads under the 1886 and 1894 Acts but, even if he did, there would need to be clear evidence of him having expressly acted under his statutory powers to deem a road to be a public road, in which case there would need to be a clear narration on the plan.

Summary

[77] In summary, a legal roadway or road over Māori land only exists and should only be shown on a survey plan if:

> (22) There is in the Gazette a notice taking and laying out of a road under the Public Works legislation; or
> (23) A plan of a road has been registered in the land transfer system under s 43(1)(d) of the 1989 Act or its predecessors; or
> (24) Prior to the 1909 Act, there is clear evidence that the Governor has authorised the taking and laying out of the road; or
> (25) From the 1909 Act on, there exists in the Gazette a proclamation by the Governor taking and laying out the road; or
> (26) The Court has made a roadway order; or
> (27) Upon the deposit of a survey plan under the land transfer system showing a road to be vested in the local authority or the Crown as per s 238 of the 1991 Act and its predecessors.

[78] If these circumstances do not exist then, notwithstanding that a survey plan purports to show a road or roadway, the conclusion must be that there is no legal road or roadway and the options for any party that has relied on the existence of a roadway would be to bring a claim for some form of equitable relief or alternatively to seek orders from the Court under either ss 316, 321 or 326A-326D of the 1993 Act.

Appendix 3

Extract from the Oharotu 4 (and other blocks) decision of the Māori Land Court

Statutory provisions in relation to roadway orders

[4] In *Deputy Registrar - Utakura 7* (2010) 7 Taitokerau MB 71 (7 TTK 71) I discussed the five different methods by which roadways or roads could be created over Māori land. In *Deputy Registar - Kapowai A1A* (2010) 7 Taitokerau MB 125 (7 TTK 125) I addressed roadways in the context of consolidation schemes. Here, we are only concerned with roadways made by order of the Court.

[5] I use the term "roadway" to include a road or road-line or roadway made by the Court as intended by s 414 of the Māori Affairs Act 1953 ("1953 Act").

[6] The Court has had the power to make roadway orders since the Native Land Court Act 1886 ("1886 Act"). As the roadway orders before me were all made under the Native Land Act 1931 ("1931 Act") or later legislation, I provide only a brief summary of the earlier legislation.

Legislation pre Native Land Act 1931

[7] Section 91 of the 1886 Act empowered the Court on an investigation of title or partition to order that land was "subject to such rights of private road for the purpose of access". Such an order could be made at any time within five years of the partition. Section 92 empowered the Court to make similar orders in relation to land previously divided by the Court provided that an application was made within two years. Section 93 provided for the Governor to take and lay off roads for public purposes. Orders made by the Court were termed "rights of private road" whereas land taken by the Governor was termed "line or lines of road" as per the earlier legislation.

[8] Section 69 of the Native Land Court Act 1894 ("1894 Act") more or less repeated the powers of the Court under the 1886 Act.

[9] The Native Land Act 1909 ("1909 Act") represented a complete re-write of the Native Land legislation. Section 117 provided for the Court to lay out "road-lines" on the partition of land. Section 117(2) provided that the Governor could proclaim any road-line to be a public road. Section 117(3) provided:

> Unless and until such a Proclamation is made, the land so set apart as road-line shall remain Native land held in common ownership as if no partition order had been made.

[10] The 1909 Act removed the Governor-General's power to take land for roads. It now required a two stage process to create a public road whereby the Court first laid out the road- line (s 117(1)) and the Governor-General then proclaimed it public road (s 117(2)). The proclamation resulted in the land being vested in the Crown in which case the freehold area of the road-line was taken from the

underlying title. However, pending such a proclamation the ownership remained as if the partition had not been made, that is, the roadway remained in "common ownership".

[11] Section 117(4) introduced the alternative of "private rights of way".

[12] Section 117 of the 1909 Act was repealed by the Native Land Amendment Act 1913 ("1913 Act") and replaced by ss 48 to 53 of that Act. Although these sections expanded the roading provisions in s 117, the particular sections need not concern us for present purposes except for s 48(4) which was in similar terms to s 117(3) of the 1909 Act:

> Unless and until such a Proclamation is made, the lands so set apart as road-lines shall remain Native land held in common ownership as if no partition order had been made, but subject to such rights of way (if any) as shall be stated in the orders made on partition and specified in the manner provided by sub-section two hereof.

Native Land Act 1931 and following

[13] Sections 476 to 490 of the 1931 Act introduced a more comprehensive roading regime.

[14] The Court could make roadway orders in relation to "Native freehold land" in several circumstances. Under s 477 the Court could "lay out" road-lines at the time of partition. Under s 478 the Court could "lay out" road-lines over land previously partitioned where it was without reasonably practical access to any public road. Under s 479 the Court could "lay off" road-lines in order to give access or better access to any Native freehold land. In addition, under s 480 the Court could make orders creating private rights of way.

[15] It is difficult to discern any substantive difference in the use of the terms "lay out" in ss 477 and 478 and "lay off" used in s 479. It is likely to be the result of inconsistent drafting as throughout ss 476 to 490 the terms "road", "lines of road" and "road-lines" are interchanged, as are the words "private rights of way", "private way" and "right-of-way". Nevertheless, as I explain later, how a roadway order is expressed may determine whether or not a separate freehold title arises.

[16] The Court had additional powers to create roadways in relation to other freehold land (s 483) and to declare public roads (ss 482 and 484). Under s 486 the Court could recommend that a road or road-line be declared a public road, in which case the Governor- General could then proclaim it to be a public road (s 487). Section 487(3) provided:

> Unless and until such a Proclamation is made, the land so set apart as road-lines shall remain Native land held in common ownership as if no order had been made, but subject to full rights of way thereover (if any) as shall be stated in the orders.

[17] In other words, unless and until the roadway was declared a public road, it remained Native land in its former ownership but the roadway order and any partition or title orders made in reliance on the roadway remained effective. Where the roadway was created as a separate freehold title, it remained as such. As the roadway orders I am concerned with demonstrate, it was not uncommon for there to be an intention to proclaim a roadway to be a public road but for that proclamation to never occur.

[18] Finally, ss 488 to 490 provided for the cancellation of roadways and the consequences of cancellation.

[19] Sections 414 to 432 (Part XXVII) of the 1953 Act governed roads. Interestingly, s 414 acknowledged the range of terms previously used by deeming "roadway" in Part XXVII to include "a road or roadway, or road-line, or right of way, or by any other name or description". Section 415 provided for the general power of the Court to lay out roadways in accordance with Part XXVII. Section 418 related to access to Māori land, s 419 to access to General land and s 420 to access to Crown land. The Court's power to grant rights of way was not contained in Part XXVII but in s 30(j) of the Act.

[20] Section 416 provided for the effect of roadways:

> **416 Effect of laying out roadway**
>
> (6) Subject to the provisions of subsection two hereof, the laying out of a roadway over any land shall confer on all persons the same rights of user as if it were a public road.
>
> (7) In any order laying out a roadway or in any subsequent order the Court may define or limit the persons or classes of persons entitled to use the same and may define or restrict their rights of user in such manner and to such extent as it thinks fit.
>
> (8) In any order laying out a roadway or in any variation of that order the Court may impose conditions as to the formation or fencing of the roadway or as to any other matter that it thinks fit, and may suspend or limit the right to use the roadway until those conditions have been complied with.
>
> (9) The laying out of a roadway over any land shall not affect the ownership of the land comprised therein, or its description as Māori land, or Crown land, or [General land] (as the case may be).
>
> (10) Where any land … is laid out as a roadway pursuant to this Part of this Act it shall be deemed to be a private way if the rights of user, as defined by the Court, are in any way restricted, and, if the rights of user are not so restricted, it shall be deemed to be a private [road].
>
> (11) Notwithstanding anything in this Part of this Act, no private road or private way shall be laid out within the district of a territorial authority otherwise than in accordance with sections 347 and 348 of the Local Government Act

1974 (as enacted by section 2 of the Local Government Amendment Act 1978).

[21] Much of Part XXVII repeated the provisions of the 1931 Act. However, it introduced ss 424 and 427 which, as I explain later, expressly recognised that roadway orders may give rise to separate freehold titles:

424 Powers of Court on cancellation of roadway

(12) Where, pursuant to section 423 hereof, the Court cancels an order for the laying out of any roadway for which a separate instrument of title exists, the Court may cancel that instrument of title and may amend any other instrument of title so as to include therein the whole or any part of the land comprised in the roadway, and the land so included in any instrument of title shall thereupon vest in the owner or owners as if it had been originally included therein, and shall become subject to any reservations, trusts, rights, titles, interests, or encumbrances to which the land comprised in that instrument of title is then subject.

(13) Where the land comprised in any roadway as aforesaid is not included in a separate instrument of title, the owners shall thereafter hold the same freed from its reservation as a roadway.

(14) The foregoing provisions of this section as to the cancellation of orders shall, as far as applicable and with any necessary modifications, apply to the variation pursuant to section 423 hereof of an order of the Court as to roadways.

(15) Any order made by the Court under this section shall, upon production, be registered by the District Land Registrar or the Registrar of Deeds, as the case may be, and the District Land Registrar is hereby authorised to make such amendments in any instrument of title as may be necessary to give effect to any order under this section.

427 Alienation of land to include alienation of interest in roadway giving access to that land

(3) Where any roadway which is comprised in a separate instrument of title has, whether before or after the commencement of this Act, been laid out by the Court over any Māori freehold land, the transfer by sale or otherwise of any land to which the roadway gives access shall, unless the instrument of alienation expressly provides to the contrary, be and be deemed to have been a transfer by the alienor to the alienee of his interests (if any) in the roadway. If any such instrument of title is registered under the Land Transfer Act 1952, the alienee may apply for registration under that Act of any interest to which he has become entitled under this section, and the District Land Registrar may register the same accordingly.

(4) In any case to which subsection one hereof does not apply, the alienee of any land to which any roadway gives access (whether or not a separate title

exists in respect of the roadway) shall have the same rights of access and be subject to the same obligations as were enjoyed by or imposed on the alienor in respect of the roadway prior to the transfer.

[22] Section 315 to 326D of the 1993 Act provide for roadways and easements. Like the 1931 and the 1953 Acts, the 1993 Act provides for the Court to "lay out" roadways but does not expressly stipulate when such orders give rise to separate freehold titles. Sections 323 and 326 of the 1993 Act more or less repeat ss 424 and 427 of the 1953 Act:

323 Powers of Court on cancellation of roadway

(4) Where, pursuant to section 322 of this Act, the Court cancels an order for the laying out of any roadway for which a separate instrument of title exists, the Court may cancel that instrument of title and may amend any other instrument of title so as to include in it the whole or any part of the land comprised in the roadway; and the land so included in any instrument of title shall thereupon vest in the owner or owners as if it had been originally included in it, and shall become subject to any reservations, trusts, rights, titles, interests, or encumbrances to which the land comprised in that instrument of title is then subject.

(5) Where the land comprised in any roadway is not included in a separate instrument of title, the owners shall thereafter hold the land freed from its reservation as a roadway.

(6) The foregoing provisions of this section as to the cancellation of orders shall, as far as they are applicable and with any necessary modifications, apply to the variation pursuant to section 322 of this Act of an order of the Court as to roadways.

(7) Any order made by the Court under this section shall, upon production, be registered by the District Land Registrar or the Registrar of Deeds, as the case may be; and the District Land Registrar is hereby authorised to make such amendments in any instrument of title as may be necessary to give effect to any order under this section.

326 Alienation of land to include alienation of interest in roadway giving access to that land

(2) Where any roadway that is comprised in a separate instrument of title has, whether before or after the commencement of this Act, been laid out by the Court over any Māori freehold land, the transfer by sale or otherwise of any land to which the roadway gives access shall, unless the instrument of alienation expressly provides to the contrary, be and be deemed to have been a transfer by the alienor to the alienee of the alienor's interest (if any) in the roadway.

(3) If any such instrument of title is registered under the Land Transfer Act 1952, the alienee may apply for registration under that Act of any interest to which the alienee has become entitled under this section, and the District Land Registrar may register the same accordingly.

(4) In any case to which subsection (1) of this section does not apply, the alienee of any land to which any roadway gives access (whether or not a separate title exists in respect of the roadway) shall have the same rights of access and be subject to the same obligations as were enjoyed by or imposed on the alienor in respect of the roadway before the transfer.

Summary

[23] Several points arise from this brief review of the historical legislation.

[24] First, the legislation never spelt out when a roadway order gave rise to a separate freehold title and when it was in the nature of an easement only. The same sections were used for both types of order. It was a matter of judicial discretion and judgment and depended on what the Judge making the order considered to be appropriate in the circumstances.

[25] Second, whether or not the Court granted a right of way in addition to or instead of a roadway was also a matter of judicial discretion. As only a roadway could be proclaimed a public road, the Court could be expected to order a roadway whenever such a proclamation was anticipated.

[26] Third, unless and until a roadway was declared a public road, its underlying ownership and status remained unchanged.